A **KESATUAN PEKERJA-PEKERJA MALAYSIA SHIPYARD & ENGINEERING SDN BHD**

v.

B **MALAYSIA SHIPYARD & ENGINEERING SDN BHD & ANOR AND ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ABU SAMAH NORDIN JCA
C RAMLY ALI JCA
[CIVIL APPEAL NOS: W-01-28-2000 & W-01-29-2000]
1 JUNE 2010

D ***CIVIL PROCEDURE:*** *Appeal - Reinstatement of - Application for - Whether applicant could require court to reinstate which had been struck out as of right - Whether court estopped from reviewing decision made by another panel - Whether there was sufficient material for court to enable its exercise in discretion in applicant's favour - Whether applications flawed and devoid of merit*

E The applicant was the appellant in appeal No W-01-28-2000 (the first appeal) against the decision of the Kuala Lumpur High Court dismissing the applicant's application for *certiorari* to quash part of the award of the Industrial Court in respect of Award 479 of 1996 on remedies and appeal No W-01-29-2000 (the second appeal) F against the decision of the High Court allowing the first respondent's application for *certiorari* to quash the entire award 479 of 1996. Both appeals were struck out by the Court of Appeal at its sitting on 1 September 2009. By notice of motion (encl. 35a) in the first appeal and notice of motion (encl. 28a) in the second appeal G ('the said applications'), the applicant prayed, *inter alia*, for an order that the appeal specified in the respective notice motion which had been struck out by the Court of Appeal be reinstated and the Registrar be directed to fix a new date for hearing of the said appeal. What transpired on the hearing date of 1 September 2009 H culminating in the two appeals being struck out was that the appellant's counsel had applied for an adjournment to enable them to file an application to discharge themselves on the ground that they were unable to get instructions from their client to which the I respondent's counsel objected. The respondent had highlighted the fact that the record of appeal was filed out of time, did not contain the High Court Order notwithstanding the several opportunities

given by the first respondent's counsel, as well as by the court, to perfect the record of appeal. Further, the court had granted an adjournment on an earlier date, 20 October 2009, and had pronounced that the subsequent hearing date would be a final date. Thus, the Court of Appeal did not allow the adjournment and had struck out both the appeals. Hence, the applicant's application for reinstatement of the respective appeal.

Held (dismissing encl. (35a) and encl. (28a))
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) In making a considered decision for an application for reinstatement such as this, in the interests of the due administration of justice, three trite principles were borne in mind. Firstly, an applicant could not require a court to reinstate a matter which had been struck out as of right. It is not merely a matter of partaking in an automatic formal exercise. Secondly, reinstatement involves an exercise of the court's discretion. Thirdly, there must be sufficient material before the court to enable it to exercise its discretion in the applicant's favour. (para 30)

(2) This court was estopped from reviewing a decision made by another panel of a court of co-ordinate jurisdiction. The applicant, if dissatisfied with the decision of the panel of the Court of Appeal on 1 September 2009, the proper recourse for them to take was to appeal to the appropriate forum, and not to apply for reinstatement. (para 31)

(3) Both encls. (35a) and (28a) were flawed. The said applications were supported by an affidavit affirmed by a former secretary of the applicant. The party to the proceedings under appeal was the union, not the deponent of the supporting affidavit to the application in his personal capacity. The exhibit attached to the said applications did not confirm that the deponent had been authorized to affirm the supporting affidavit in respect of these two appeals on the applicant's behalf. As the deponent did not have the necessary *locus standi* to affirm the supporting affidavit on behalf of the applicant, there was therefore no proper affidavit filed in support of the said applications. Further, the affidavit did not disclose any grounds to justify the reinstatement of the two appeals. (paras 32 & 33)

(4) The applicant clearly had not taken the necessary steps to expedite a speedy disposal of the appeals. On the contrary, their conduct in frequently changing counsels had resulted in the hearing of the appeals being repeatedly adjourned. The applicant's lack of diligence was a factor to be taken into account. As at 1 September 2009, the appeal records continued to be defective as it was filed out of time without any leave of court, and did not contain the high court order under appeal. The applicant nor the various solicitors representing them had not taken the necessary action to perfect the Record of Appeal. In the circumstances before the panel of the Court of Appeal on 1 September 2009, they clearly had the discretionary power to strike out the two appeals. Applying settled principles, the applications for reinstatement filed by the applicants were devoid of merit. (paras 34, 35 & 37)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon adalah perayu di dalam rayuan Nombor W-01-28-2000 (rayuan pertama) terhadap keputusan Mahkamah Tinggi Kuala Lumpur menolak permohonan pemohon untuk *certiorari* bagi membatalkan sebahagian award Mahkamah Perusahaan berhubungan Award 479 tahun 1996 mengenai remedi-remedi dan rayuan Nombor W-01-29-2000 (rayuan kedua) terhadap keputusan Mahkamah Tinggi membenarkan permohonan responden pertama untuk *certiorari* bagi membatalkan keseluruhan Award 479 tahun 1996. Kedua-dua rayuan ditolak oleh Mahkamah Rayuan pada persidangannya bertarikh 1 September 2009. Melalui notis usul (lampiran 35a) di dalam rayuan pertama dan notis usul (lampiran 28a) di dalam rayuan kedua ('permohonan-permohonan tersebut'), pemohon telah memohon, antara lain, untuk perintah bahawa rayuan yang dikatakan di dalam notis usul yang telah dibatalkan oleh Mahkamah Rayuan dihidupkan semula dan pendaftar diarahkan menetapkan tarikh baru untuk perbicaraan rayuan tersebut. Apa yang berlaku pada tarikh persidangan 1 September 2009 yang mengakibatkan kedua-dua rayuan dibatalkan adalah peguambela perayu telah memohon untuk lanjutan masa supaya mereka boleh memfailkan permohonan untuk melepaskan diri mereka atas alasan mereka tidak dapat arahan dari klien mereka tetapi ini dibantah oleh peguambela responden. Responden berhujah bahawa rekod rayuan telah difailkan di luar masa, tidak mengandungi perintah Mahkamah Tinggi walaupun beberapa peluang telah diberi oleh peguambela responden pertama, dan juga oleh mahkamah, untuk menyempurnakan rekod rayuan. Seterusnya, mahkamah telah membenarkan lanjutan kepada tarikh

lebih awal, 20 Oktober 2009, dan telah menyatakan bahawa tarikh persidangan kemudiannya adalah tarikh terakhir. Oleh itu, Mahkamah Rayuan tidak membenarkan lanjutan yang dipohon dan telah membatalkan kedua-dua rayuan. Ini adalah permohonan pemohon untuk menghidupkan semula rayuan-rayuan tersebut.

Diputuskan (menolak lampiran (35a) dan lampiran (28a))
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Dalam membuat keputusan permohonan menghidupkan semula seperti ini, demi kepentingan pentadbiran keadilan, tiga prinsip nyata mesti difikirkan. Pertama sekali, pemohon tidak sepatutnya meminta mahkamah menghidupkan semula perkara yang telah dibatalkan mengikut hak. Ia bukanlah hanya satu perkara mengambil bahagian dalam perlaksanaan formal automatik. Kedua, menghidupkan semula perkara melibatkan perlaksanaan budibicara mahkamah. Ketiga, mesti terdapat material yang mencukupi di hadapan mahkamah supaya mahkamah boleh melaksanakan budibicaranya dalam memihak kepada pemohon.

(2) Mahkamah diestop daripada menyemak keputusan yang telah diputuskan oleh panel mahkamah yang lain yang mempunyai bidangkuasa selaras. Pemohon, jika tidak puas hati dengan keputusan panel Mahkamah Rayuan pada 1 September 2009, cara yang betul yang patut diambil adalah untuk merayu kepada forum yang sesuai, dan bukan untuk memohon menghidupkan semula.

(3) Kedua-dua lampiran (35a) dan (28a) adalah cacat. Kedua-dua permohonan disokong oleh afidavit yang diikrar oleh bekas setiausaha pemohon. Pihak kepada prosiding di bawah rayuan ini adalah Kesatuan, bukan deponen afidavit sokongan kepada permohonan di dalam kapasiti peribadi. Eksibit yang dilampirkan kepada permohonan-permohonan tersebut tidak mengesahkan bahawa deponen telah diberi kuasa untuk mengikrar afidavit sokongan berhubungan kedua-dua rayuan bagi pihak pemohon. Oleh kerana deponen tidak mempunyai *locus standi* yang diperlukan untuk mengikrar afidavit sokongan bagi pihak pemohon, tidak terdapat afidavit yang teratur yang difailkan untuk menyokong permohonan-permohonan tersebut. Seterusnya, afidavit tidak memberi alasan-alasan untuk memberikan justifikasi bagi menghidupkan semula kedua-dua rayuan.

(4) Pemohon tidak mengambil langkah-langkah yang diperlukan untuk mempercepatkan pelupusan rayuan-rayuan. Bertentangan dengan itu, tindakan pemohon yang sering menukar peguambela telah mengakibatkan persidangan rayuan-rayuan dilanjutkan beberapa kali. Kekurangan kerajinan pemohon adalah faktor yang diambilkira. Pada 1 September 2009, rekod rayuan masih defektif kerana ia difailkan di luar masa tanpa kebenaran mahkamah, dan tidak mengandungi perintah mahkamah tinggi di bawah rayuan. Pemohon mahupun beberapa peguambela yang telah mewakili mereka tidak mengambil tindakan yang diperlukan untuk menyempurnakan Rekod Rayuan. Dalam keadaan sedemikian di hadapan panel Mahkamah Rayuan pada 1 September 2009, mereka dengan jelasnya mempunyai kuasa budibicara untuk membatalkan kedua-dua rayuan. Menggunapakai prinsip-prinsip yang ditetapkan, permohonan-permohonan untuk menghidupkan semula yang difailkan oleh pemohon-pemohon tidak mempunyai merit.

Case(s) referred to:
Capital Insurance Bhd v. Kasim Mohd Ali [2000] 1 CLJ 269 CA ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 26, 56

For the appellant - Hassan Karim; M/s Hassan Karim & Co
For the respondent - N Sivabalah (E Reena with him); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion Nos: R1-25-141-1996 & R1-R1-25-31-1998]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaleha Zahari JCA:

[1] The applicant, is the appellant in both Appeal No. W-01-28-2000 (the 1st Appeal) and Appeal No. W-01-29-2000 (the 2nd Appeal). The 1st Appeal is against the decision of the Kuala Lumpur High Court dated 28 March 2000 dismissing the applicant's application for *certiorari* to quash part of the award of the Industrial Court in respect of Award 479 of 1996 on remedies which was the subject matter of Kuala Lumpur High Court No. RI-25-141-98.

[2] The 2nd Appeal is a related appeal. The applicant is appealing against the High Court decision on the same date in allowing Kuala Lumpur High Court No. RI-25-31-98, the 1st respondent's application for *certiorari* to quash the entire Award 479 of 1996.

[3] Both appeals were struck out by the Court of Appeal at its sitting on 1 September 2009.

[4] By notice of motion [encl. (35a)] in the 1st Appeal, and notice of motion [encl. (28a)] in the 2nd Appeal, both dated 7 October 2009 ("the said applications"), the applicant prayed, *inter alia*, for an order that the appeal specified in the respective notice motion which had been struck-out on 1 September 2009 by the Court of Appeal be reinstated and the Registrar be directed to fix a new date for hearing of the said appeal. The said applications did not identify under which provisions of law it was based.

Background

[5] The circumstances which led to the appeals referred to in the said applications being struck out was this.

[6] The appeals are concerned with a retrenchment exercise implemented by the 1st respondent on 1 March 1987 which affected a total of 342 employees. The retrenched employees were paid salary in lieu of notice and retrenchment benefits under cl. 47 of Award 122 of 1985 of the collective agreement which was then applicable. The applicant then filed a complaint under s. 56 of the Industrial Relations Act 1967 alleging, *inter alia*, non-compliance of cls. 47.2 and 47.3 of the collective agreement.

[7] The Industrial Court heard the complaint and dismissed the same *vide* Award No. 111 of 1987 dated 1 April 1987. The Industrial Court ruled that the 1st respondent had complied with cls. 47.2 and 47.3 and upheld the procedure implemented by the 1st respondent, ie, in departing from complying with the 'last in first out' policy. Thereafter, the applicant filed Johor Bahru High Court O.M. No. 32-57 of 1987 for an order of *certiorari* to quash Award No. 111 of 1987. The applicant's *certiorari* proceedings were dismissed by the Johor Bahru High Court on 17 November 1988.

[8] Subsequent to the retrenchment exercise, 270 retrenched employees entered into individual agreements with the 1st respondent and received the first of three installment payments amounting to RM383,000. The 1st respondent could not effect subsequent installment payments arising from an injunction obtained on 14 July 1987 by the applicant against, amongst others, the 1st respondent.

[9] Meanwhile, the applicant filed a representation of trade dispute regarding the retrenchment of 291 of the affected employees ("the claimants"). The matter was referred to the Industrial Court for adjudication under s. 26 of the Industrial Relations Act 1967. The Industrial Court (ie, the 2nd respondent), in handing down its decision in Award No. 479 of 1996, held that the 1st respondent was wrong to have retrenched the claimants as it had failed to prove that they were excess employees. The Industrial Court then ruled that the claimants were entitled to backwages limited to twenty-four (24) months subject to deduction of the installment of *ex gratia* payment and any other benefits already received by the claimants. The Industrial Court also awarded compensation *in lieu* of reinstatement for the period the claimants served the 1st respondent.

[10] The 1st respondent, dissatisfied with the Industrial Court's award, then, *vide* Kuala Lumpur High Court No. R1-25-31-98, applied for an order of *certiorari* to quash the entire award. At the same time, the applicant, *vide* Kuala Lumpur High Court No. RI-25-141-98, applied for an order of *certiorari* to quash part of the same award in relation to the remedy given to the claimants which was of a monetary nature and not reinstatement.

[11] On 28 March 2000, the High Court judge allowed the 1st respondent's application in Kuala Lumpur High Court No. RI-25-31-98 and issued an order of *certiorari* to quash Award No. 479 of 1996 with costs. As for the applicant's application in Kuala Lumpur High Court No. R1-25-141-98, the High Court judge dismissed the said application with no order as to costs.

[12] The applicant lodged an appeal against these decisions of the High Court to the Court of Appeal, which appeals were struck out by the Court of Appeal on 1 September 2009. The applicant then, *vide* the notice of motions encl. (35a) in the 1st Appeal and encl. 928a) in the 2nd Appeal applied to reinstate the respective appeal.

[13] In making a considered decision on these two applications for reinstatement the chronology of events from the date of its filing to the date of it being struck out as disclosed in the affidavit filed in support of and in opposition to, as well as the minutes in the court file were taken into consideration.

Chronology

[14] *Vide* letter dated 19 September 2000 the 1st respondent's solicitors informed the applicant's then solicitors, Messrs Nijar Kumar, Netto & Partners, that the Record of Appeal which had been filed and served upon them, was not filed within the prescribed time limit. *Vide* another letter dated 14 June 2005 to Messrs Nijar Kumar, Netto & Partners, the 1st respondent's solicitors referred to their earlier letter dated 19 September 2000 and informed them that they would be raising this non observance of the time frame as a preliminary objection on the hearing date of the appeals.

[15] At the case management on 15 March 2007, the 1st respondent's solicitors raised the issue of the Record of Appeal being filed outside of the three weeks extension granted by the court. It was pointed out although the lawyer who had been handling the applicant's case passed away in 2004, the application by the appellant's solicitors to discharge themselves was only filed in 2007. The court granted an order-in-terms of the application to discharge Messrs Nijar Kumar, Netto & Partners as the applicant's solicitors on 13 August 2007.

[16] At the subsequent case management dates of 31 January 2008 and 4 March 2008, the applicant's representative was present and was instructed by the court to appoint counsel.

[17] On the following case management date on 6 May 2008, Messrs Ten & Colin appeared on behalf of the applicant and was instructed by the court to obtain the High Court Order and take the necessary action to perfect the Record of Appeals. The court then fixed the hearing of the appeals for 20 October 2008.

[18] *Vide* letter dated 13 October 2008 the 1st respondent's solicitors informed the applicant's new solicitors, Messrs Ten & Colin what had transpired on the case management on 15 March 2007 enclosing copies of their earlier letters dated 19 September

2000 and 14 June 2005. Notice was then given of their intention to raise the issue of the filing of the Record of Appeal out of time as a preliminary objection.

[19] The situation of these two appeals on the hearing date of the appeals on 20 October 2008 was this. The 1st respondent's counsel had filed their submissions on 13 October 2008 and were ready to proceed with the hearing. Be that as it may, Ms Norsuhaila Mat Nurdina of Messrs Ten & Colin, who appeared for the applicant, informed the court that they had filed an application to discharge themselves as solicitors on 17 October 2008. She then applied for an adjournment of the hearing of the appeals. As the application to discharge referred to by the applicant's counsel was not then before the court, the matter was stood down for the Registrar to trace the same.

[20] The appeals were recalled that same day at 11.45am. An application to discharge [encl. (91a)] had been filed by the Messrs Ten & Colin in the 2nd Appeal (Appeal No. W-01-29-2000). No application to discharge was filed in respect of the 1st Appeal (Appeal No. W-01-28-2000).

[21] The position taken by applicant's counsel then was this. She applied for an adjournment of the hearing of the 2nd Appeal to enable her to serve the application to discharge [encl. (19a)] on her client. She also sought an adjournment of the hearing of this appeal on its merits pending the disposal of encl. (19a). The 1st respondent's counsel, Encik Sivabalah, did not object to the application for adjournment of hearing of this appeal. The hearing of this appeal (W-01-29-2000) as well as encl. (19a), was then adjourned to a date to be fixed.

[22] As for the 1st Appeal, (Appeal No. W-01-28-2000), the applicant's counsel informed the court they were not appearing for the appellant in this appeal and had not filed an application to discharge themselves in respect of this appeal. Be that as it may, she also applied for this appeal to be adjourned to enable her to obtain instructions from the applicant whether they wish to proceed with this appeal. Encik Sivabalah's response to this request, to leave it to the court. The Court of Appeal upon observing the appeals to be long outstanding granted a final adjournment to a date to be fixed.

[23] The 1st respondent's solicitors *vide* letter dated 26 May 2009 to the applicant's subsequent solicitors, Messrs Jessica, Theiva & Kumaari, enclosed their earlier letters dated 19 September 2000, 14 June 2005 and 13 October 2008 to the applicants two previous solicitors informing them that the 1st respondent reserved its right to object to any application(s) for extension of time pertaining the Record of Appeal.

[24] At the case management on 26 May 2009 the applicant's counsel was instructed to obtain the High Court order and take the necessary action to perfect the Record of Appeal. In other words, the position on 26 May 2009 was the same as that on the case management 6 May 2008, on which date the same direction was given. The court then fixed the appeals to 1 September 2009 for hearing.

[25] What transpired on the hearing date of 1 September 2009 culminating in the two appeals being struck out, arising from which the applicant deemed it fit to file these two applications for reinstatement was this.

[26] Ms Jessica Ram Binwani of Messrs Jessica, Theiva, & Kumaari appeared on behalf of the applicant together with Ms S Kumaari, whilst Encik N. Sivabalah appeared on behalf of the respondent together with Ms. E. Reena. The 1st respondent's counsel, having filed their submissions pertaining to both appeals on its merits on 18 August 2009, was ready to proceed with the hearing of the appeals, in the event their preliminary objection was not allowed. The appellant's counsel then applied for an adjournment to enable them to file an application to discharge themselves on the ground that they were unable to get instructions from their client. En. Sivabalah objected to the matter being adjourned. He highlighted the fact that the Record of Appeal was filed out of time, did not contain the High Court Order notwithstanding the several opportunities given by the 1st respondent's counsel, as well as by the court, to perfect the Record of Appeal. No steps were taken by the applicant or his counsel to do so. Further, the court in granting an adjournment on 20 October 2008, had pronounced that the subsequent hearing date would be a final date. In this situation, this date being a final date, he urged the Court of Appeal to strike out both the appeals with costs.

[27] The Court of Appeal did not allow the adjournment. The appeals were then struck out. No appeal was lodged against this decision of the Court of Appeal dated 1 September 2009.

The Applications To Reinstate [encl. (35a) And encl. (28a)]

[28] About five weeks after the appeals had been struck out on 7 October 2009, the applicant, through their new solicitors, Tetuan Hassan Karim & Co., *vide* encl. (35a) in the 1st Appeal and encl. (28a) in the 2nd Appeal applied for reinstatement of the respective appeal. Both notice of motions came up for hearing on 10 February 2010. The applicant was represented by Encik Hassan Karim of Tetuan Hassan Karim & Co., whilst counsel appearing for the 1st respondent remained unchanged.

[29] Upon perusal of the affidavit filed in support of and in opposition to the applications, and the submissions of counsels of both parties, encl. (35a) and encl. (28a) were dismissed. Our reasons are as follows.

[30] In making a considered decision for an application for reinstatement such as this, in the interests of the due administration of justice, three trite principles were borne in mind. Firstly, an applicant could not require a court to reinstate a matter which has been struck out as of right. It is not merely a matter of partaking in an automatic formal exercise. Secondly, reinstatement involves an exercise of the court's discretion. Thirdly, there must be sufficient material before the court to enable it to exercise its discretion in the applicant's favour.

[31] We are of the view both encl. (35a) and encl. (28a) are flawed. This court is estopped from reviewing a decision made by another panel of a court of co-ordinate jurisdiction. The applicant, if dissatisfied with the decision of the panel of the Court of Appeal on 1 September 2009, the proper recourse for them to take is to appeal to the appropriate forum, and not to apply for reinstatement.

[32] The said applications were also flawed for another reason. They were supported by an affidavit affirmed by a former secretary of the applicant. We borne in mind the fact that the party to the proceedings under appeal is the union, not the deponent of the supporting affidavit to the application in his personal capacity. The exhibit attached to the said applications did not confirm that the

deponent had been authorized to affirm the supporting affidavit in respect of these two appeals on the applicant's behalf. Nowhere in the supporting affidavit did the deponent aver that he is a current office bearer much less a current member of the applicant. As the deponent did not have the necessary *locus standi* to affirm the supporting affidavit on behalf of the applicant, there was therefore no proper affidavit filed in support of the said applications.

[33] Another infirmity in the affidavit filed in support of the application was this. It did not disclose any grounds to justify the reinstatement of the two appeals. The affidavit merely averred at para. 19, that the appeal should be heard on its merits ("demi keadilan kes") and a bare statement as to the court's discretionary powers.

[34] What is abundantly clear from the chronology from the date of filing of the appeals was this. The applicant clearly had not taken the necessary steps to expedite a speedy disposal of the appeals. On the contrary, their conduct in frequently changing counsels has resulted in the hearing of the appeals being repeatedly adjourned. Further, on the hearing date of 20 October 2008, the Court of Appeal had pronounced that no further adjournment would be entertained at the next hearing date in respect of these long-outstanding appeals.

[35] In our view the applicant's lack of diligence was also a factor to be taken into account. As at 1 September 2009, the Appeal Records continued to be defective as it was filed out of time without any leave of court, and did not contain the High Court Order under appeal. The applicant nor the various solicitors representing them had not taken the necessary action to perfect the Record of Appeal notwithstanding the several opportunities and reminders from the 1st respondent's solicitors, as well as by the court, to do so. They just stood by. That position remained unchanged on the date of hearing of these appeals on 1 September 2009, as well as on the date of hearing encl. (35a) and (28a) on 10 February 2010. In such a situation we are in agreement with En. Sivabalah's submissions that there was no proper appeal on these dates before the Court of Appeal. (See *Capital Insurance Bhd v. Kasim Mohd Ali* [2000] 1 CLJ 269).

A **[36]** In the circumstances before the panel of the Court of Appeal on 1 September 2009, they clearly had the discretionary power to strike out the two appeals.

[37] Applying settled principles, the applications for reinstatement
B filed by the applicants were devoid of merit. For the abovementioned reasons encl. (35a) and encl. (28a) were dismissed. Costs of RM500 to the 1st respondent.

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